Supreme Court, U.S.
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Nos. 97-0970 & 97-0978

In The

Supreme Court of the United States

October Term, 1997

DONALD SMITH, BENTLEY McDONALD, BRIAN FARMER and JAMES CRULL,

Petitioners,

-and-

MUSKOGEE, OKLAHOMA, A MUNICIPAL CORPORATION,

Petitioner,

vs.

MARILYN ALLEN, Personal Representative of Terry Allen, deceased,

Respondent.

On Petitions for Writ of Certiorari to the United States Court of Appeals for The Tenth Circuit

RESPONDENT'S BRIEF IN OPPOSITION

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QUESTIONS PRESENTED FOR REVIEW

1. Is a municipality entitled to summary judgment in a Title 42 U.S.C. § 1983 action when there are material issues of fact in dispute regarding the municipality's failure to adequately train its police officers?

2. Are police officers entitled to summary judgment in a Title 42 U.S.C. § 1983 excessive force action when there are material issues of fact in dispute regarding the objective reasonableness of the officers' actions during the 90 second encounter?

LIST OF PARTIES

The parties to the proceeding on Petition for Writ of Certiorari are:

Petitioners in docket number 97-0970:

Donald Smith, Bentley McDonald, Brian Farmer, James Crull, individual police officers (Defendants in the District Court and Appellee in the United States Court of Appeals for the Tenth Circuit)

Petitioner in docket number 97-0978:

Muskogee, Oklahoma, a municipal corporation (Defendant in the District Court and Appellee in the United States Court of Appeals for the Tenth Circuit)

Respondent in docket numbers 97-0970 and 97-0978:

Marilyn Allen, Personal Representative of Terry Allen, deceased (Plaintiff in the District Court and Appellant in the United States Court of Appeals for the Tenth Circuit)

RULE 29.6 STATEMENT

Pursuant to Rule 29.6 of the Rules of this Court, Respondent states she does not have any parent companies or subsidiaries.

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OPINIONS BELOW

The opinion of the United States District Court for the Eastern District of Oklahoma granting summary judgment in favor of the Defendants was not reported. The opinion of the United States Court of Appeals for the Tenth Circuit reversing the District Court's grant of summary judgment, is reported at 119 F.3d 837 (10th Cir. 1997). The order of the Tenth Circuit Court of Appeals denying Defendants' request for rehearing en banc, was not accompanied by an opinion and is not published.

STATEMENT OF JURISDICTION

The Petitioners' statement of jurisdiction is correct.

STATUTORY AND CONSTITUTIONAL PROVISIONS INVOLVED

Petitioners have correctly set forth the provisions of 42 U.S.C. § 1983. Other statutory and constitutional provisions involved are as follows:

United States Code, Title 42:

§ 1988(a). Proceedings in vindication of civil rights

(a) Applicability of statutory and common law

The jurisdiction in civil and criminal matters conferred on the district courts by the provisions of titles, 13, 24, and 70 of the Revised Statutes for the protection of all persons in the United States in their civil rights, and for their vindication, shall be

exercised and enforced in conformity with the laws of the United States, so far as such laws are suitable to carry the same into effect; but in all cases where they are not adapted to the object, or are deficient in the provisions necessary to furnish suitable remedies and punish offenses against law, the common law, as modified and changed by the constitution and statutes of the State wherein the court having jurisdiction of such civil or criminal cause is held, so far as the same is not inconsistent with the Constitution and laws of the United States, shall be extended to and govern the said courts in the trial and disposition of the cause, and, if it is of a criminal nature, in the infliction of punishment on the party found guilty.

Constitution of the United States

Amendment IV — Searches and Seizures

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

Amendment V — Grand jury indictment for capital crimes; Double jeopardy; Self-incrimination; Due process of law; Just compensation for property

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases

arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

Amendment VIII — Excessive bail, Fines, Punishments

Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishment inflicted.

Amendment XIV, Section 1

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

STATEMENT OF THE CASE

A. Factual History

On February 20, 1994, at approximately 2:30 p.m., Mr. Allen was sitting in the driver's seat of his car in the driveway

of the home of Rhonda Oakley, Mr. Allen's sister, in Muskogee, Oklahoma. The driver's side door was open, and Mr. Allen was talking to his sisters, Rhonda Oakley and Mary Butler, his brother-in-law, Jim Butler and his niece, Lisa Perry. Mr. Allen had been taking prescription pain medication and drinking beer. (Aplt. App. at 770-771).[1] He was very depressed, he was crying and possibly suicidal. (Aplt. App. at 776-777). He had a gun laying in the passenger seat of the car. (Aplt. App. at 776). Mr. Allen's family members had their arms around him, were comforting him, and trying to get him to come into Rhonda Oakley's home. (Aplt. App. at 768).

At one point, Mr. Allen grabbed his chest as if in pain, and appeared to pass out. Rhonda Oakley went into the house to call 911 to get an ambulance. (Aplt. App. at 773). Mary Butler, Jim Butler and Lisa Perry stayed with Mr. Allen. Within minutes of Rhonda Oakley going into the house to call an ambulance, a black car "swerves up" behind Mr. Allen's vehicle. (Aplt. App. at 778). A man jumps out of the car, and as he's coming around the back end of the car he pulls out a gun. (Aplt. App. at 778). The man starts screaming "Get out of the way. Get out of the way, now"! (Aplt. App. at 779-780). The man is running fast up to Mr. Allen's car. (Aplt. App. at 780). He never stops to talk to any of the family members to find out about the situation.

In response to the man's screaming, and the fact that he had a gun pointed at them, Mary Butler grabs her daughter, Lisa Perry, and runs back behind the car. (Aplt. App. at 780). Jim Butler does not move quite as fast, he is kneeling beside Mr. Allen with his hands on Mr. Allen's hands, so the man screams again "Get out of the way. Get out of the way, now"! (Aplt. App. at 780-781). Jim Butler then gets up and gets out of the way. (Aplt. App. at 782).

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1. Citations are to documents contained in Appellant's Appendix filed in the United States Court of Appeals for the Tenth Circuit.

The man then says "Put down the gun. Put down the damn gun. Put down the goddamn gun"! (Aplt. App. at 783). Within a second after the man says "Put down the goddamn gun" shots are fired and Mr. Allen is dead. (Aplt. App. at 784). Prior to shots being fired, Jim Butler heard Mr. Allen say "Just go ahead and shoot me. Just go ahead and shoot me. I want to die". (Aplt. App. at 788).

Mr. Allen had been at Rhonda Oakley's house for approximately thirty (30) minutes prior to his death. (Aplt. App. at 774). Mrs. Oakley had been sitting inside the car in the passenger seat talking to Mr. Allen for approximately twenty (20) minutes prior to the other family members' arrival. (Aplt. App. at 769, 772).

The man who screamed at the family and at Mr. Allen was in plain clothes, and did not identify himself as a police officer. The car he was driving was just a black car with no lights or any identifying marks. (Aplt. App. at 785, 789). It was later determined that the man was Lieutenant Don Smith with the Muskogee Police Department. Approximately 90 seconds elapsed from the time Lieutenant Smith arrived until Mr. Allen was killed. (Aplt. App. at 811).

On the day Mr. Allen was killed, the Muskogee Police Department held a squad meeting at one-thirty in the afternoon. During the squad meeting, which was conducted by Smith, the dispatchers brought in a teletype. According to Smith, the teletype named Mr. Allen, gave his description, and said he was wanted from another county (Wagoner County) on a § 1983 misdemeanor warrant of impersonating an officer. The teletype also said that Mr. Allen was armed and should be approached with caution, that he had threatened his relatives, and that some relatives lived in Muskogee, so he could possibly be coming to the Muskogee area. (Aplt. App. at 794).

Smith was not sure if the misdemeanor warrant was a valid warrant because it said 1983. He thought it was a typographical error, which he testified happens quite frequently, and should have read 1993. A 1983 misdemeanor warrant would have been too old for an arrest to be made. (Aplt. App. at 812-813). The misdemeanor warrant was, in fact, for a 1983 misdemeanor offense that had been dismissed years prior to this incident. (Aplt. App. at 791-792).

Neither Smith, nor any of the other police officers went to look for Mr. Allen after the squad meeting. In fact, Smith did some paperwork around the office and then, around two-thirty in the afternoon, he decided to go wash his car. Smith left the police station and was en route to the car wash when his dispatcher called and wanted him to call him back. (Aplt. App. at 795-796). Smith went on to the car wash and called the dispatcher from a pay phone. Smith cannot remember if he washed his car first or used the pay phone first.

When he called the dispatcher, Smith was advised that the information from Wagoner County was that Mr. Allen was in town and was possibly at his sister's house at 4421 West Broadway. (Aplt. App. at 796). Smith advised the dispatcher that he would go check it out. (Aplt. App. at 797). Smith drove to Mr. Allen's sister's house and saw Mr. Allen's car. He then drove on for about a block and-a-half, called the dispatcher, told him he had located the car, and asked that units be sent that way, and that the information on the warrant be brought to him. (Aplt. App. at 798).

While Smith was waiting, the dispatcher advised him that EMS (Emergency Medical Systems) was en route, that Mr. Allen had attempted suicide possibly with drugs and alcohol. (Aplt. App. at 799). Smith immediately went to Mr. Allen's sister's house, parked behind Mr. Allen's vehicle, ordered the family

members to get out of the way, and went up to Mr. Allen who was sitting in the vehicle with the driver's door open, one leg in, one leg out. (Aplt. App. at 800-802).

Smith saw that there was a revolver in the car laying across the console, pointed at the dash. (Aplt. App. at 802). Smith drew his weapon and told Mr. Allen to give him the gun. (Aplt. App. at 802). Mr. Allen told Smith "shoot me, just go ahead and shoot me, I don't want to live". (Aplt. App. at 802). Smith observed that Mr. Allen was "listless", that he (Mr. Allen) "wasn't focusing on everything", and that he "was not presenting a threat". (Aplt. App. at 802-803).

During the brief time that Smith was confronting Mr. Allen, the other officers arrived. Officer McDonald came up to Smith's right shoulder, Officer Farmer moved to the right-rear corner of Mr. Allen's vehicle, Officer Crull moved to the back of the vehicle. (Aplt. App. at 803). Smith then went into the car and reached over Mr. Allen, into the passenger seat of the car trying to grab Mr. Allen's Gun. Officer McDonald grabbed Mr. Allen's left shoulder and was holding him while Smith tried to grab the gun. Mr. Allen just moved the gun a little farther away. Smith tried again to go over the top of Mr. Allen and get the gun. Mr. Allen just moved the gun a little farther away. During Smith's attempts to go over Mr. Allen and get to the passenger seat to get the gun, Mr. Allen was still listless, he didn't try to grab Smith, he didn't make any overt moves, he just moved the gun away. (Aplt. App. at 804-805; 832-833).

Officer Farmer then moved to the front passenger side door and tried to open it. As a result of the noise from Officer Farmer trying to open the passenger door, which was locked, Mr. Allen looked up at Officer Farmer, then looked back at Smith, and moved his arm and gun around in Smith's direction. Smith then shot Mr. Allen. (Aplt. App. at 805). Smith was two to

three feet from Mr. Allen when he (Smith) fired his first round. Mr. Allen's weapon discharged after he was shot by Smith. Whether Mr. Allen intended to discharge his weapon is unknown. Smith told Kelly Beach, the officer that investigated the incident, that Mr. Allen did not fire his weapon until after Smith had shot his first round. (Aplt. App. at 834). Smith and Officer McDonald started firing and continued firing until Mr. Allen quit moving. (Aplt. App. at 806-807). Smith fired his gun eight times. (Aplt. App. at 836). Officer McDonald fired his weapon four times. (Aplt. App. at 835). Mr. Allen was struck by four bullets. (Aplt. App. at 836).

B. Misstatements of Fact by Petitioner, Muskogee, Oklahoma

As noted by the Tenth Circuit in its opinion, there is no evidence in the record that the police officers had any knowledge of Petitioner's (City's) facts numbered 1, 2, 3, 4, 7, and 11, either prior to or at the time of the incident in question.[2]

The City's facts numbered 16, 17, 18, 19, 20, 21, 22, 23, 24 and 25 all have to do with police training. The City overstates the training with respect to dealing with mentally disturbed

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2. The Tenth Circuit stated:

> In granting summary judgment, the district court went beyond the agreed-upon facts and made its own findings. The court found, for example, that the officers knew that Mr. Allen had claimed to have killed three people before arriving at his sister's home. Whether the officers knew does not alter our review, but Plaintiff is correct in pointing out that the court's finding is not supported by the record.

The Tenth Circuit's Opinion in this case is located at Appendix 1 of the City's Petition.

people that is actually received by the police officers. In the district court as well as in the Tenth Circuit, the City focused almost exclusively on deadly force training as opposed to training on how to deal with the mentally/emotionally disturbed.

Contrary to the City's fact numbered 25, the Respondent (Mrs. Allen) does have knowledge of the officer's training. Prior to the shooting death of Mr. Allen, in February 1994, the police officers involved had received their basic training required to be a police officer by the State of Oklahoma, and a one hour course on mental health law in November 1993. The City failed to produce any evidence of the training provided by the State, if any, with respect to dealing with the mentally or emotionally disturbed.

The one hour course provided by the City consisted of a review of any new mental health laws, changes in procedures by Green Country Mental Health, which is the mental health group in town, and a training film. (Aplt. App. at 808-809).

The City's fact numbered 27 is hotly disputed by Mrs. Allen's expert witness, Dr. George Kirkham. The City's fact numbered 28 is taken out of context. Dr. Kirkham testified as follows:

> A. Well, I am forced to conclude from this record that it is the testimony of Muskogee Police Department, at least in the person of Lieutenant Brook, I have not seen any other command officers that — that, "Though these materials are provided, and though there are handouts on handling abnormal people in a way that I'm familiar with, and I represent to you as proper, that we don't do it this way. We train them to do it the way they did it." Which means — inevitably, it means to not use

> cover at their own discretion in a situation like this, to let innocent people remain out in the open, to engage in provocative, or seemingly provocative and precipitous conduct with mentally ill people who have guns.
>
> That is the way they really do it and that's improper.

(Aplt. App. at 823-824).

Dr. Kirkham further testified that the individual officers could not have possibly been properly trained and still have handled the situation as they did.

> Q. Yeah. We knew he had been drinking and maybe taking drugs, but no one knew he was going to point a gun at those officers.
>
> A. With all due respect, this is a fundamental point in this case. I don't think that any properly trained police officer, knowing what was known, could not imminently foresee the risk of a firearms situation resulting.
>
> We know that you've got someone that is mentally ill. Not only are they mentally ill, they have violently attacked people, they have a firearm, they've been taking drugs and alcohol. Those are every conceivable kind of warning signs that I could even imagine, and you're going to approach and confront that person in the open and not foresee the likelihood of a violent encounter? Not only that, but then they tell you, on top of all that, that they want you to kill them. They want to die. And you continue to provoke them.

> This is the most — I'll say this on the record, this is the most egregious example of the mishandling of a mentally ill person by police officers that I believe I've ever seen. I will stand on my record of 20 years of practice.

(Aplt. App. at 825-826).

The City's fact numbered 31 is disputed by Mrs. Allen as demonstrated by the testimony of Dr. Kirkham quoted above.

With respect to the statutes found at footnote 9 at pages 20 and 21 of the City's Petition, there is *no* evidence that the police officers received the training described in the rule promulgated by CLEET which went into effect on September 1, 1992 (70 O.S. § 3311.5). Lieutenant Smith never went through CLEET. All of the other officers involved had completed their CLEET training prior to September 1, 1992, the effective date of § 3311.5.

C. Misstatements of Fact by Petitioners, Donald Smith, Bentley McDonald, Brian Farmer, and James Crull

The Tenth Circuit did not hold that the reasonableness of the officers' use of force should be judged upon the demeanor of one of the officers as he approached the car and cleared the area of bystanders. The Tenth Circuit held that it would consider an officer's conduct prior to the suspect's threat of force if the conduct is "immediately connected" to the suspect's threat of force.

The Tenth Circuit's holding does not "eviscerate[]" the test of objective reasonableness crafted by this Court. The Tenth Circuit's holding, pursuant to the facts of this case, does not conflict with the holdings of other courts of appeals.

As noted at paragraph 1 of section B above, and at footnote 2 of this Brief, the police officers had no knowledge of most of the matters set forth at the second and third paragraphs on page 3 and continued onto page 4 of the Officers' Petition.

The remainder of the Officers' version of the facts are disputed as set forth in Respondents' Factual History under section 1(A) above.

With respect to footnote 1 of the Officers' Petition, there is no evidence that Mr. Allen threatened the Officers at all. There is also no evidence that Mr. Allen "fired upon" the Officers until after Mr. Allen had been shot by Lieutenant Smith.

The Tenth Circuit did not "convert[ ] the test of objective reasonableness . . . into a subjective examination . . .".

D. Procedural History

Mrs. Allen filed her Complaint in the United States District Court for the Eastern District of Oklahoma pursuant to 42 U.S.C. §§ 1983 and 1988, alleging a violation by the Petitioners of Mr. Allen's 4th, 5th, 8th and 14th Amendment rights, and failure of the City and the Chief of Police, Rex Eskridge, to properly train its police officers.

The City and Chief of Police, as well as the individual police officers, filed Motions for Summary Judgment. The district court entered its Order granting Summary Judgment in favor of all Defendants. The district court found that there were no genuine issues of material fact in dispute, that the individual officers committed no constitutional violation, and that the City was entitled to summary judgment because municipal liability requires a constitutional violation by the officers.

Mrs. Allen appealed the district court's decision to the United States Court of Appeals for the Tenth Circuit. The Tenth Circuit found that there were material issues of fact in dispute, and concluded that Mrs. Allen presented sufficient evidence as to the Officers and the City to withstand summary judgment.

REASONS FOR DENYING THE CITY'S PETITION

Mrs. Allen's appeal to the Tenth Circuit was from a grant of summary judgment. The Tenth Circuit simply found that there were material issues of fact in dispute, and therefore, summary judgment was not proper.[3] There has been no trial in this case. Mrs. Allen has not had an opportunity to present her case to a jury for a determination of the hotly contested factual issues herein involved. The Tenth Circuit was correct in finding that there were material issues of fact in dispute making the district court's grant of summary judgment improper. The Tenth Circuit also correctly interpreted *City of Canton v. Harris*, 489 U.S. 378 (1989).

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3. With respect to the City, the Tenth Circuit found that the *basis* upon which the district court granted summary judgment was faulty. In this regard, the Tenth Circuit stated:

> After the district court determined the individual officers committed no constitutional violation, the court granted summary judgement to the City, reasoning that municipal liability requires a constitutional violation by the officers. . . . the court erred in entering summary judgment on that ground because we have concluded plaintiff presented sufficient evidence that the officers committed a constitutional violation to withstand a summary judgment motion.

I.

THE TENTH CIRCUIT'S INTERPRETATION OF *CANTON* WAS CORRECT

The City argues that "*Canton* stands for the proposition that liability will attach only when a city *fails to provide* training to its officers." (City's Petition p. 13). The City concludes that the Tenth Circuit misinterpreted *Canton* in reversing the district court's grant of summary judgment because there was evidence that the City had provided training to its officers on dealing with mentally disturbed persons. The City refuses to recognize that "[i]n resolving the issue of a city's liability, the focus must be on *adequacy* of the training program in relation to the tasks the particular officers must perform." *Id.* at 390. The City also refuses to recognize that a question of fact exists as to whether a one hour course on mental health law is sufficient training to relieve the City of liability. Likewise, a question of fact exists as to whether training officers to leave cover, rush up to an armed suicidal person and try to take away his gun, constitutes adequate training.[4] This Court in *Canton* stated as follows:

> The issue in a case like this one, however, is whether that training program is *adequate*; and if it is not, the question becomes whether such *inadequate training* can justifiably be said to represent "city policy." It may seem contrary to common sense to assert that a municipality will actually have a policy of not taking reasonable steps to train its employees. But it may happen that in light of the duties assigned to specific officers or employees the need for *more*

4. The police officers testified in deposition that they acted in conformity with their training. Plaintiff's expert, Dr. Kirkham testified that if the police officers acted in conformity with their training, then the training was inadequate.

> *or different training* is so obvious, and the *inadequacy* so likely to result in the violation of constitutional rights, that the policymakers of the city can reasonably be said to have been deliberately indifferent to the need. In that event, the failure to provide *proper* training may fairly be said to represent a policy for which the city is responsible, and for which the city may be held liable if it actually causes injury. (Emphasis added).

489 U.S. at 390, 109 S. Ct. at 1205.

The Tenth Circuit did not misinterpret *Canton* or create any new basis for municipal liability. The Tenth Circuit's decision stands for the proposition that ***in this case***, based upon the evidence presented at the summary judgment stage, a factual dispute exists as to the training received by the police officers in dealing with mentally disturbed persons.

The City would have *Canton* stand for the proposition that municipal liability will only attach when a city admits that it ***completely*** failed to train its officers. Respondent submits that improper training of police officers poses as much, if not more of a danger to citizens, than no training at all. In *Commissioners of Bryan County v. Brown*, 117 S. Ct. 1382 (1997), this Court held:

> We concluded in *Canton* that an "inadequate training" claim could be the basis for § 1983 liability in "limited circumstances." (citations omitted) We spoke, however, of a deficient training "program," necessarily intended to apply over time to multiple employees. Existence of a "program" makes proof of fault and causation at least possible in an inadequate training case.

This Court has thus made clear that a *complete* failure to train is not necessarily a prerequisite for § 1983 municipal liability. In this case there is evidence that there was a training "program" intended to apply over time to multiple employees. There is also evidence that the training program is "inadequate" and "deficient". The Tenth Circuit correctly applied *Canton*, as well as *Brown* in reversing the district court's grant of summary judgment.

II.

THE FIRST SHOT IS NOT FREE

The City contends that proof of other incidents similar to the one in dispute is required before the City can be held liable. In *City of Oklahoma City v. Tuttle*, 471 U.S. 808, 105 S. Ct. 2427 (1985) (plurality opinion), Justice Brennan, in his concurring opinion stated:

> A rule that the city should be entitled to it's first constitutional violation without incurring liability — even where the first incident was the taking of the life of an innocent citizen — would be a legal anomaly, unsupported by the legislative history or policies underlying Sec. 1983. A Sec. 1983 cause of action is as available for the first victim . . . as it is for the second and subsequent victims; by exposing a municipal defendant to liability on the occurrence of the first incident, it is hoped that future incidents will not occur.

The Court reiterated this position in *Brown, supra*, stating as follows:

> In *Canton*, we did not foreclose the possibility that evidence of a single violation of federal rights,

> accompanied by a showing that a municipality has failed to train its employees to handle recurring situations presenting an obvious potential for such a violation, could trigger municipal liability. 489 U.S., at 390, and n. 10 ("[I]t may happen that in light of the duties assigned to specific officers or employees the need for **more** or **different** training is so obvious . . . that the policymakers of the city can reasonably be said to have been deliberately indifferent to the need").

In this case, the police officers testified that dealing with mentally or emotionally disturbed people is something they do "all the time." There was evidence that the use of force arose under circumstances that constituted a usual and recurring situation with which police officers must deal. The Tenth Circuit was correct in finding that:

> [b]y providing direct evidence of inadequate training, . . . plaintiff provided sufficient evidence beyond the occurrence of the single incident to withstand summary judgment.

III.

THERE IS NO SPLIT AMONG THE CIRCUITS

This Court has held that in determining municipal liability, "the focus must be on the adequacy of the training program in relation to the tasks the particular officers must perform." *Canton*, 109 S. Ct. at 1205-06. *Mateyko v. Felix*, 924 F.2d 824 (9th Cir. 1991), is the only case cited by Petitioner, from circuits other than the Tenth Circuit, that involves excessive force. *Mateyko* involved training in the use of Tazer guns. The City produced evidence that its officers received three to four hours

of training specifically in the use of Tazer guns. The Ninth Circuit found, under the evidence presented in that case, that:

> no reasonable jury could conclude these alleged inadequacies in training, *without more*, established deliberate indifference to the rights of person with whom the police came in contact.

Id. at 826. (Emphasis added).

In this case, unlike in *Mateyko*, the Tenth Circuit found that:

> [t]here was evidence presented to the district court that the officers received inadequate training on how to deal with mentally ill or emotionally upset persons who are armed with firearms.[5]

Allen at 842. The Tenth Circuit stated:

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5. The Tenth Circuit noted that Plaintiff's expert witness testified in deposition that

> [i]f the State of Oklahoma through CLEET trains their officers to not be mindful of cover, to be aggressive with mentally ill people, do all these things that are totally off the board, then the State is wrong and out of synch with the rest of the country in the police profession.

Allen at 842. The testimony is undisputed that the officers acted in accordance with their training.

In addition, there is no evidence that the police officers involved in this incident received the training described in paragraph 3 of Petitioner's footnote 9 with respect to mental health treatment. In fact, Officer Smith did not attend CLEET.

> When viewed in the light most favorable to the plaintiff, the record contains evidence that the officers were trained to act recklessly in a manner that created a high risk of death. The evidence is sufficient to support an inference that the need for different training was so obvious and the inadequacy so likely to result in violation of constitutional rights that the policymakers of the City could reasonably be said to have been deliberately indifferent to the need.

Allen at 843.

Unlike the cases selectively cited by the Petitioner, the evidence of inadequate training presented by the Plaintiff in this case was substantial. Inadequate training cases are fact specific. The difference in the facts and evidence presented in the cases cited by the Petitioner, and the facts and evidence presented in this case, determined the different outcomes; not a difference in interpretation of the law. There is no split among the circuits requiring review by this Court.

IV.

THE TENTH CIRCUIT DID NOT "SECOND-GUESS" THE STATE TRAINING PROGRAM

The Petitioner filed for summary judgment requesting the federal court to decide whether its training program was adequate, as opposed to allowing a jury, made up of citizens of the eastern district of the State of Oklahoma, to decide this issue. Ultimately, the City did not receive the answer it was looking for from the federal court system. Now the City complains that the federal court has no business deciding this issue at all, unless it decides the issue in favor of the City.

The Respondent agrees, that given the disputed issues of fact in this case, a court should not be permitted to decide whether these police officers were adequately trained. As decided by the Tenth Circuit, there are material issues of fact in dispute regarding the training actually received by the officers. Under our system of jurisprudence, a jury, made up of citizens of the state and district where the cause of action arose, are to decide these disputed factual issues. The Tenth Circuit recognized that:

> Summary judgment is appropriate only if "there is no genuine issue as to any material fact and . . . the moving party is entitled to a judgment as a matter of law." Fed.R.Civ.P. 56(c). A disputed fact is "material if it might affect the outcome of the suit under the governing law, and the dispute is "genuine" if the evidence is such that a reasonable jury could return a verdict for the nonmoving party. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248, 106 S. Ct. 2505, 2509, 91 L. Ed.2d 202 (1986). We construe the factual record and reasonable inferences therefrom in the light most favorable to the nonmovant. *Gullickson v. Southwest Airlines Pilots' Assoc.*, 87 F.3d 1176, 1183 (10th Cir. 1996).

The Tenth Circuit did not "second guess" anyone. Likewise, the Tenth Circuit did not "override" the State of Oklahoma. The "federalism" cases cited by the Petitioner have no application here. The Tenth Circuit did not promulgate any rules, or issue any directives with respect to the City or State law enforcement training programs. The Tenth Circuit found that the City had failed to present sufficient evidence of the training actually received by the officers in order to be entitled to summary judgment.

The police officers and witnesses for the City testified that the officers acted in conformity with their training. Dr. Kirkham, Plaintiff's expert witness, testified that if the officers are trained to aggressively rush up on mentally disturbed, suicidal people and attempt to disarm them in the manner that they did in this case, then the training is "wrong and out of synch with the rest of the country in the police profession." The City produced no evidence to rebut Dr. Kirkham's testimony, other than to say the police officers acted in accordance with their training. The City produced no evidence of the training actually received.

The State of Oklahoma has directed CLEET to set ***minimum*** training requirements for a person to become a police officer. The City would have this Court hold that as long as the City sends its officers to CLEET, regardless of what the officers are trained to do or not to do, and regardless of whether the City trains its officers to follow or not follow the CLEET training, the City cannot be liable. Such a holding would completely deprive citizens of the right to hold cities accountable for constitutional violations due to improper training, making § 1983, as well as this Court's decision in *Monell v. New York City Dept. of Social Services*, 436 U.S. 658 (1978), and its progeny, a nullity.

The Tenth Circuit found that the Plaintiff had produced sufficient evidence supporting each of the four (4) requirements set forth in *Canton*. The Tenth Circuit did not hold the City liable. The Tenth Circuit said that, under the evidence presented, and given the disputed facts in this case, a jury, not a court, should decide whether the City is liable. There is no federalism issue involved in this case.

REASONS FOR DENYING THE OFFICERS' PETITION

I.

THE TENTH CIRCUIT CORRECTLY APPLIED THE OBJECTIVE REASONABLENESS STANDARD

In excessive force cases, the Court pays "careful attention to the facts and circumstances of [the] particular case," *Graham v. Connor*, 490 U.S. 386, 109 S. Ct. 1865, 104 L. Ed. 2d 443 (1989), and asks whether the "totality of the circumstances" justified the use of force. *Tennessee v. Garner*, 471 U.S. 1, 105 S. Ct. 1694, 85 L. Ed. 2d 1 (1985). The reasonableness of the Officers' actions depends both on whether the officers were in danger at the precise moment that they used force, and on whether the Officers' own reckless or deliberate conduct immediately connected with the seizure unreasonably created the need to use such force. To hold otherwise would make the "totality of the circumstances" inquiry set forth by this Court in *Tennessee v. Garner* meaningless.

The district court in granting summary judgment in this case in favor of the Officers found that the Officers acted objectively reasonable under the circumstances. As noted by the Tenth Circuit, however, the district court's findings of what the circumstances were was erroneous.[6]

FIRST — The district court's finding of fact #1 has to do with an incident that happened at the Plaintiff's home the day before. There was no evidence in this case that the Officers had *any* knowledge of this incident.

SECOND — The district court's finding of fact #2, was that Mr. Allen told his sister "I'm going to die today, either by

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6. The district court's Order, including its Findings of Fact, is located at Appendix B of the Officers' Petition for Writ of Certiorari.

the pills or a policeman's gun", and that he had "killed three people on highway 16" — There is *no* evidence in this case that the Officers had *any* knowledge of this statement.

THIRD — The district court's finding of fact #4 was:

> the court finds those Defendants had information that Plaintiff's Decedent/Spouse had committed battery upon his wife and children, had threatened to kill certain persons, and had stated he had killed three people . . .

There is *no* evidence in this case that the Officers had *any* knowledge of any of these statements.

The Officers are correct that 20/20 hindsight is not to be used in determining whether police officers acted reasonably. The argument usually made by police officers, is that they had no knowledge of the information argued in support of a Plaintiff's case. Here, however, the police officers, as well as the district court, used information that was discovered *after the fact* to justify the officers' use of excessive force.

In examining whether the Officers' actions were objectively reasonable, it is necessary to look at what the Officers actually knew. In this case, the Officers knew:

1. That there was a 1983 misdemeanor warrant from another county for Mr. Allen impersonating a police officer;

2. That a 1983 misdemeanor warrant was too old for an arrest to be made;

3. That Mr. Allen had threatened family members earlier in the day;

4. That he was armed and should be approached with caution.

5. That he may be attempting suicide with pills and alcohol (*not* with a gun); and

6. That he was having chest pains.

This is *all* the Officers knew when they arrived at the scene.

The next inquiry that must be made is: What did the Officers observe upon arriving at the scene?

1. A person fitting Mr. Allen's description sitting in a car with one leg in and one leg out; and

2. Two women and a man surrounding Mr. Allen — the man was kneeling on the ground in front of Mr. Allen with his hands on Mr. Allen's hands which were resting in Mr. Allen's lap; one of the women had her hand on Mr. Allen's shoulder.

Under *Graham v. Connor*, 490 U.S. 386 (1989) the factors employed to determine reasonableness are:

1. The severity of the crime at issue;

2. Whether the subject poses an immediate threat to the safety of the officers, and

3. Whether the subject is resisting arrest.

None of these factors are present in this case. There was no valid crime at issue. There was no threat to the officers when they arrived at the scene. There was no valid arrest to be made.

The facts of this case do not support the Officers' argument that the situation was "rapidly evolving", or that there were any "instantaneous decisions" to be made.

It is important to remember that the following actions by the Officers took place within 90 seconds of Lieutenant Smith arriving at the scene:

1. Lieutenant Smith, in plain clothes, jumps out of his unmarked car, draws his gun, and screams "Get out of the way. Get out of the way now!"

2. Lieutenant Smith never stops to talk to any of the people surrounding Mr. Allen, nor does he ever identify himself as a police officer.

3. Lieutenant Smith runs up to Mr. Allen's car and yells at him to "put down the goddamn gun!"

4. Mr. Allen says something to the effect of "Just go ahead and shoot me, I don't want to live".

5. By this time the other Officer's have arrived, Officer McDonald holds onto Mr. Allen's shoulder while Officer Smith reaches into the car, across Mr. Allen, and tries to grab the gun laying in the passenger seat.

6. Mr. Allen was "listless" and "not presenting a threat", according to Lieutenant Smith.

7. Mr. Allen just moved the gun a little farther away.

8. Lieutenant Smith then tries again to go over the top of Mr. Allen and grab the gun.

9. Mr. Allen again just moved the gun a little farther away.

10. Then, Officer Farmer tries to get into the passenger side door to get the gun.

11. Mr. Allen picks the gun up off of the seat and moves it around to Lieutenant Smith's side.

12. Lieutenant Smith fires, then Mr. Allen's gun discharges.

13. Lieutenant Smith fired his gun 8 times, Officer McDonald fired 4 times. Mr. Allen was struck by 4 bullets and was killed.

Although Mr. Allen had a gun in his car, he hadn't shot anyone. He hadn't threatened anyone. The gun wasn't even in Mr. Allen's hand at the time the Officers began trying to take it away. Given the facts that the Officers *actually* had knowledge of at the time, and the circumstances that the Officers observed at the scene, in other words, given the "totality of the circumstances" during the 90 seconds involved, were the Officers' actions objectively reasonable? Plaintiff's expert, Dr. Kirkham testified as follows:

> . . . That's why the principles are to contain, control, communicate from a covered position. By the time — and most of these situations eventuate without anybody being killed or injures (sic). It's when you start to look — and the record seems so clear to me in this case. The things Terry Allen does are directly in response to very provocative activities by the

> officers. Trying to grab the gun, trying to get in the door, standing out in the open. Now we're in the posture of saying it's a split second shooting. Of course it is, but what the hell were they doing in this position to begin with?

(Aplt. App. at 821).

The Tenth Circuit was correct in holding that the Officers failed to carry their initial burden of demonstrating the absence of a genuine issue of material fact with regard to the objective reasonableness of the Officers' actions. The objective reasonableness standard was correctly applied by the Tenth Circuit in this case. The Officers' Petition should be denied.

II.

THERE IS NO SPLIT AMONG THE CIRCUITS

The Tenth Circuit, citing *Romero v. Board of County Comm'rs*, 60 F.3d 702, 705 n.5 (10th Cir. 1995), *cert. denied*, __ U.S. __, 116 S. Ct. 776, 133 L. Ed. 2d 728 (1996); *Bella v. Chamberlain*, 24 F.3d 1251, 1256 n.7 (10th Cir. 1994), *cert. denied*, 513 U.S. 1109, 115 S. Ct. 898, 130 L. Ed. 2d 783 (1995); and *Tennessee v. Garner, supra*, held that:

> We will thus consider an officers' conduct prior to the suspect's threat of force if the conduct is "*immediately connected*" to the suspect's threat of force. (Emphasis added).
>
> * * *
>
> The entire incident, from the time Lt. Smith arrived to the time of the shooting, took only ninety seconds.

> Clearly, the officers' preceding actions were so "*immediately connected*" to Mr. Allen's threat of force that they should be included in the reasonableness inquiry. (Emphasis added).

Contrary to the Officers' argument, the Fourth, Seventh and Second Circuits are in accord. As quoted by the Officers in their Petition, the Fourth Circuit in *Greenridge v. Ruffin*, 927 F.2d 789 (4th Cir. 1991), relying on the Seventh Circuit cases of *Ford v. Childers*, 855 F.2d 1271 (7th Cir. 1988) and *Sherrod v. Berry*, 856 F.2d 802 (7th Cir. 1988), held that the officer's liability be determined upon an examination and weighing of the information the officers possessed "*immediately prior* to *and* at the very moment they fired the fatal shot[s]." The Second Circuit, in *Salim v. Proulx*, 93 F.3d 86 (2d Cir. 1996), as quoted in the Officers' Petition, also held the officer's knowledge of circumstances "*immediately prior* to *and* at the moment that he made the split-second decision to employ deadly force" is relevant.

Respondent submits that there is not much, if any, difference between the words "immediately prior" and "immediately connected". If anything "immediately connected" denotes a stronger connotation in that it requires that the Officers' actions be connected to the seizure itself. Here, the entire event took 90 seconds. The Officers' actions in dispute took place "immediately prior" to and were "immediately connected" with the seizure itself. The Tenth Circuit's decision in this case is in accordance with the majority of the other circuits, as well as this Court's decision in *Tennessee v. Garner*. The Officer's Petition should be denied.

CONCLUSION

The evidence presented by the City of the training it gave its officers with respect to dealing with the mentally and emotionally disturbed, consisted almost exclusively of its blanket statement that the officers involved acted in accordance with their training. The City's statement is self-serving and is not sufficient to entitle it to summary judgment on Plaintiff's inadequate training claim.

The Plaintiff, on the other hand, presented direct and substantial evidence of inadequate training beyond the occurrence of this single incident. Dealing with mentally or emotionally disturbed individuals is something police officers are required to do on a frequent and recurring basis. As Dr. Kirkham testified:

> [I]f police trainers in the State of Oklahoma are using this case as an example of how you properly handle a mentally ill individual, then police officers will assuredly die, and other mentally ill people and probably innocent people will die.

The facts and evidence presented in this case are sufficient for a jury to find that the City's failure to properly train its officers reflected deliberate indifference to the obvious consequence of the City's choice; the death of Terry Allen.

For the reasons set forth above, the City's Petition for a Writ of Certiorari should be denied.

The Officers failed to carry their burden of demonstrating the absence of a genuine issue of material fact in this case. The district court's findings of fact were not supported by the record and were erroneous. The Tenth Circuit followed the

majority of the Circuits, as well as decisions of this Court, in holding that the actions of the Officers "immediately connected" to the seizure are relevant to the objective reasonableness inquiry in this case.

For the reasons set forth above, the Officers' Petition for a Writ of Certiorari should be denied.

Respectfully submitted,

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